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Nos. 99-603, 99-960

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IN THE

Supreme Court of the United States

October Term, 2000

LEGAL SERVICES CORPORATION,

Petitioner,

and

UNITED STATES OF AMERICA,

Petitioner,

v.

CARMEN VELAZQUEZ *ET AL.*,

Respondents.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amicus curiae the American Judicature Society submits this brief in support of Respondents.

Founded in 1913, the American Judicature Society is a national, non-profit organization with members who are judges, lawyers, and lay people dedicated to improving the administration of justice. It is funded through members' dues, contributions, and grant funds for special projects. For 86 years, the Society has been the foremost national organization speaking with a credible and independent voice on administration of justice issues.

The Society's mission includes promoting improvements in the operation of the courts and building knowledge through empirical research. The Society develops and sponsors educational programs on the justice system for law students, journalists, teachers, recent immigrants, jurors, and other citizens. It publishes *Judicature*, a bi-monthly refereed journal that contains articles on a wide range of court system issues, including recent examinations of jury reform; social science, the courts, and the law; judicial performance evaluations; and the growing impact of the new genetics on the courts. Through awards, such as the Herbert Harley Award, the Justice Award, and the Toni House Award, the Society recognizes individuals and groups for contributions to the justice system and increasing public understanding of the administration of justice.

The Society's Center for Judicial Conduct Organizations promotes the development of judicial discipline that is fair but does not compromise judicial independence. The Elmo B. Hunter Citizens Center for Judicial Selection promotes judicial selection reform to ensure a bench of the highest quality.

The Society's Center for Judicial Independence promotes a judiciary that is free to issue fair and just rulings without bowing to popular and political pressures. The Center focuses

attention on the proper role of the judiciary in relation to the legislative and executive branches of government and responds to the negative effects of misleading or politically motivated attacks on the judiciary. The Center also conducts research and produces publications that further the understanding of the threats to, and opportunities for strengthening, the independence of the judiciary. The Center develops educational programs and materials to emphasize the importance of an independent judiciary and sponsors various public education and outreach programs.

Because of its historical and continuing commitment to judicial independence and the effective administration of justice, the Society respectfully asks this Court to consider the following arguments: (1) that the restrictions placed on arguments Legal Services Corporation attorneys can raise in welfare cases are unconstitutional based on Separation of Powers and federalism concerns; or (2) alternatively, that Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA")[1] should be construed to avoid the serious constitutional questions that result from the Government's proposed interpretation.

STATEMENT OF THE CASE

Amicus curiae relies on Respondents' Statement.

SUMMARY OF ARGUMENT

It is the unique "province and duty" of the judicial branch to say "what the law is". *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Separation of Powers between the political branches acting under Articles I and II and the judicial branch acting under Article III is designed, among other things, to preserve this prerogative. Congress may not limit, or curb, the arguments--most importantly constitutional

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[1] Pub. L. 104-134 § 504(a)(16), 110 Stat. 1321, 1321-55-56 (1996).

arguments--that courts may consider in deciding cases within their jurisdiction.

This case involves Section 504(a)(16) of the OCRAA ("the Appropriations Rider"). The Government interprets the Rider to mean Legal Services lawyers are forbidden to claim--or even to argue--that a particular welfare rule, regulation or provision in a statute is either unconstitutional or contrary to statutory law, including the governing welfare statute itself.[2] *If* the Rider means what the Government says it does (*but see* Point III showing it does not), it would be an unconstitutional violation of the Separation of Powers. (Point I.)

The Separation of Powers, and the protection it entails of the judicial branch's prerogative to "say what the law is", has been a key part of our Constitution from inception. The Government's construction of the Appropriations Rider is entirely antithetical to the role of the judicial branch in the

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[2] In its brief, the LSC claims that the Rider prohibits "a lawyer's argument to a court [that] a welfare reform law is unconstitutional or illegal". Br. of LSC at 18. The United States similarly says the Rider would forbid representation that would involve challenges to a welfare statute on "meritorious constitutional grounds" or "statutory challenges". Br. of United States at 28, 30.

The LSC's "final rule" on Section 504(a)(16) construed the Rider's ban on litigation involving "an effort to reform a federal or state welfare system" to preclude litigation with respect to "rules or regulations enacted as part of a reform of a welfare system". 62 Fed. Reg. 30765-77 (June 5, 1997) (*codified at* 45 C.F.R. Pt. 1639). The LSC interpreted the ban on suits for relief that would "amend or otherwise challenge" "existing law" in the Rider's proviso as relating to federal, state or local laws enacted "as an effort to reform a welfare system", or regulations promulgated thereunder pursuant to notice and comment procedures. *Id.* at 30766. (The LSC takes the position that agency *policies* may be challenged, however. *Id.* at 30766 (Preamble to Final Rule); Br. of LSC at 7.)

For ease of reference, the interpretations above are referred to as the "Government's interpretation" or "Government's construction".

Separation of Powers. It skews the adversary system and forces courts to decide cases with a hamstrung advocate on one side. Under the Separation of Powers, Congress cannot make a law that inhibits courts from carrying out their duty to evaluate statutes in light of the Constitution, which is the supreme law of the land. Nor can they hamper courts in determining whether statutes comport with one another. (Point I.)

The Government's construction of the Appropriations Rider as applied to the state courts also contravenes settled principles of federalism. (Point II.)

The constitutional questions can be avoided. The Government's construction of the Appropriations Rider is wrong or, at the least, so dubious that it should be rejected so as to avoid the resulting "serious doubt of constitutionality" on First Amendment, Separation of Powers and federalism grounds. *Ashwander v. TVA*, 297 U.S. 288, 345-356 (1936) (Brandeis, J., concurring). (Point III.)

The Appropriations Rider prohibits a Legal Services lawyer from engaging in "litigation, lobbying, or rulemaking" that involves an "effort to reform" a Federal or State welfare "system". Pub. L. 104-134, 504(a)(16), 110 Stat 1321-55-56. The plain meaning of this basic prohibition against "effort[s] to reform" a welfare "system" does not prohibit attempts to assure *compliance with law*, including the Constitution under *Marbury*.

The Rider's basic prohibition against "effort[s] to reform" a welfare "system" is followed by a proviso stating that the prohibition does not preclude a lawyer funded by the Legal Services Corporation (the "LSC") under the Legal Services

Corporation Act[3] ("LSC Act") from "seeking" "specific relief" from a welfare agency, if "such relief" does not involve:

> "an effort to amend or otherwise challenge existing law. . . ."

The Rider thus prohibits "effort[s] to reform" a welfare "system". It expressly allows suits for "specific relief" where such relief would not "amend or otherwise challenge" existing law. Properly understood, these restrictions limit only legal action that would have the effect of systemwide change. Nothing in the Rider, therefore, should be understood to prohibit any particular *arguments* in support of claims that do not attempt to "reform" a welfare "system". This understanding of the Rider not only obeys its language, but would also be faithful to the language and intent of the Legal Services Corporation Act itself.[4] The LSC's interpretation of the Rider (*i.e.,* that it bans constitutional and statutory arguments), therefore, is wrong. (Point IIIA.)

An additional defect plagues the Government's extension of its reading to preclude contentions that a welfare rule, regulation or provision in a statute is unconstitutional. Under our system, when courts consider constitutional claims, they are ensuring compliance with law--not "reforming" or "challenging" it. Congress should not be assumed to have perversely singled out constitutional contentions as beyond the pale unless it spoke with clarity. *Cf. Webster v. Doe*, 486 U.S.

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[3] 42 U.S.C. § 2996 *et. seq* (1974).

[4] As set forth at greater length in Part I of the brief of *amici curiae* New York State Bar Association *et al.*, the LSC Act mandates that Legal Services lawyers should perform their duties according to the "highest" quality of professional standards, 42 U.S.C. § 2996f(a)(1), with "full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the . . . standards of the legal profession", *id.* § 2996(6), and that the LSC should "insure" "protection of the . . . adversary process from any impairment in furnishing legal assistance to eligible clients". *Id.* § 2996f(a)(1).

592, 603 (1988); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). This it surely did not do.

However, even if the Rider could be seen as ambiguous, under *Ashwander*, in order to avoid serious problems under the Separation of Powers (this brief), and the First Amendment (Respondents' brief), as well as conflicts with the LSC Act's provisions on ethics (*amicus* brief of New York State Bar Association *et al.*), the Rider should not be construed to prohibit claims--and certainly not arguments--by Legal Services lawyers that are intended to assure compliance with the Constitution and other governing law. (Point III B.)

ARGUMENT

I. AS CONSTRUED BY THE GOVERNMENT, THE CONSTRAINTS PLACED ON THE ADVERSARIAL PROCESS IN WELFARE CASES RESULT IN AN UNCONSTITUTIONAL INTRUSION ON THE SEPARATE POWERS OF THE JUDICIAL BRANCH.

A. The Constitution Prohibits the Political Departments from Acting to Prevent, or to Inhibit, Article III Courts from Exercising Their Province and Duty to Say What the Law Is.

During colonial times and the era of the Articles of Confederation, legislatures commonly usurped the powers and ability of courts to decide cases. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). *See also The Federalist No. 48*, at 311 (James Madison) (Clinton Rossiter ed., 1961) (discussing the need for Separation of Powers because some colonial legislatures had "*decided rights* which should have been left to *judiciary controversy*"). The distinctions between legislative, executive and judicial power were blurred--and the

separate and distinct powers of courts were often plucked away by legislatures. Thus,

> "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression". *Plaut*, 514 U.S. at 219.

A sense of "sharp necessity to separate the legislative from the judicial power" "triumphed among the Framers of the New Federal Constitution". *Id.* at 221. *See also INS v. Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring).

As explained in the Federalist Papers, the Judicial Branch was, "from the nature of its functions", "least dangerous to the political rights of the Constitution". *See Plaut*, 514 U.S. at 223 (quoting *The Federalist No. 78*, at 465 (Alexander Hamilton)). The judicial branch, "beyond comparison the weakest . . . department", with "no influence over either the sword or the purse", was recognized as uniquely vulnerable to incursions from the other two departments. Hence, "all possible care" should be taken to guard the judiciary against "attacks" by its coordinate branches. *The Federalist No. 78* at 465-66.

Fundamental to the Separation of Powers is that Congress cannot require Article III courts to consider and enforce laws without being able to evaluate the constitutional validity of those laws. If *Marbury* means anything, it is that in deciding cases, courts cannot be compelled to "close their eyes to the Constitution". *Marbury*, 5 U.S. (1 Cranch) at 178.

Time and again, this Court has resisted the notion that Congress can recognize jurisdiction, yet at the same time limit the arguments courts can hear, especially when the forbidden arguments are constitutional ones. *See Marbury*, *supra*; *see also infra* pp. 15-18. After *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871), it is a Separation of Powers truism

that Congress may not interfere with the decision making process of the courts by dispensing with judicial review when the Constitution is at stake. *See also Plaut*, 514 U.S. at 218, 225; *Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 84 (1970) (acknowledging "the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function"); *see also* Henry M. Hart, Jr., *"The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic"*, 66 Harv. L. Rev. 1362, 1373 (1953) (Article III prevents Congress from telling courts *how* to decide); Martin H. Redish, *"Federal Judicial Independence: Constitutional and Political Perspectives"*, 46 Mercer L. Rev. 697, 707 (1995) ("[D]ecisional independence is the *sine qua non* of the federal judiciary's operation").

This Court applied the decisional independence principle in *Klein*, invalidating an attempt by Congress to limit this Court's ability to apply the Constitution according to its own interpretation. *Yakus v. United States,* 321 U.S. 414 (1944), is to like effect. There, this Court upheld a statutory scheme that limited the arguments courts could hear in criminal cases. But judicial acceptance of that limitation turned on the Court's confidence that those important constitutional claims would ultimately be heard by a court competent to decide them. *See* Hart, 66 Harv. L. Rev. at 1380. Here, there is no such alternative, uncompromised forum.

Similarly, Congress violates the Separation of Powers when it legislates in a way that immunizes its legislation from judicial review, or puts a thumb on its side of the scale in litigation.[5] Congress' job is to enact laws *consistent* with the Constitution. It unconstitutionally aggrandizes its own power

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[5] *See Klein*, 80 U.S. (13 Wall.) at 147-48 (Congress cannot weight decision toward itself in cases where it is a party). *Cf. United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (no Separation of Powers problem where Congress exposed itself to liability).

when it passes laws and at the same time seeks to limit constitutional review of those laws.

Congress could not forbid courts to consider constitutional or statutory arguments when a Legal Services lawyer represents a plaintiff in a welfare case over which the courts have jurisdiction. Likewise, interference by Congress with the adversary system so as to alter the judicial process and substantially increase the likelihood that constitutional and statutory issues will be purged from welfare cases (*see* Point B below) violates the Separation of Powers.

If the Government's construction of the Appropriations Rider is correct, it would drive a wedge between court and counsel in a manner that degrades the courts' ability to perform their constitutional function. Just as Congress cannot require courts to turn a blind eye to the Constitution or to governing statutes, so it cannot render courts deaf to constitutional or statutory arguments by choking off a lawyer's voice to articulate them.

B. The Rider Would Distort and Prevent the Effective Functioning of the Adversary System and Undermine the Ability of Courts to Exercise Their Province and Duty to Say What the Law Is.

The Government's construction of the Rider wreaks havoc with the adversary system on which the effective exercise of the judicial power "largely depends".[6] This undermines and distorts the courts' province and duty of finding and saying what the law is.

In the mid-1990s, welfare "as we have known it" was pronounced dead.[7] In Congress, and in the states--some on

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[6] *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (internal quotation omitted).

[7] Transcript of President Clinton's Address to a Joint Session of Congress, *New York Times*, Feb. 18, 1993, at A20.

their own initiative and then all in response to the mandates of Congress--complex new welfare rules and regulations were enacted.

When it passed the Appropriations Rider, Congress reaffirmed its commitment to federal funding of legal services and recognized federally-funded lawyers would be necessary to help indigent persons cope with the complex new regulations and assure consistent enforcement. Accordingly, Congress authorized Legal Services lawyers to help implement the new rules by representing indigent litigants in court to seek payment under the new laws and regulations. However, according to the Government's interpretation, Congress, at the same time, forbade Legal Services lawyers to contend to a court that a rule, regulation, or provision in a statute is inconsistent with a state constitution, a statutory provision, or the United States Constitution.[8]

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[8] Given that this is the Government's own construction, *see* Br. of United States at 26-30, it is perplexing that petitioner United States characterizes the Rider's constitutional defects as somehow "hypothetical" and resistant to facial challenge. *Id.* at 28 n.12. As framed by the Government, every instance of Legal Services representation will require a continuing search for constitutional or statutory issues, followed by a possible denial or termination of representation if they arise, and then an (often fruitless) search for substitute counsel. Indeed, the Legal Services attorney for respondent Carmen Velazquez experienced firsthand the ethical bite of the Government's interpretation of the Rider in being forced to resign from ongoing representation and leave a client to languish without benefits. Br. of Respondents at 3. Ms. Velazquez's inability to find substitute counsel is no less concrete, *id.*, nor is the dearth of alternatives to Legal Services representation nationwide.

This is a far cry from *NEA v. Finley*, 524 U.S. 569, 583-84 (1998), cited by the United States, where the facial challenge depended on the remote possibility that an agency *might, in the future*, manipulate subjective criteria in a viewpoint-discriminatory fashion. In contrast, the Government's interpretation places a "substantial obstacle" in the way of a "large fraction" of cases, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992); therefore, a facial challenge is entirely appropriate. *See also City of Chicago v. Morales*, 527

1. By Skewing the Adversary Process and Forcing Courts to Decide Cases with a Hamstrung Advocate on One Side, Congress Violates the Separation of Powers.

The vast majority of welfare cases will be brought by Legal Services lawyers. (The blithe assumption of the dissent below and the Government's brief that other counsel can readily be found is wrong[9].) It is the most basic litigation reality that, operating under the Government's rule, courts will not be able to perform their constitutional function because they will have to do so without the uncompromised assistance of lawyers upon which our adversary system of justice depends. The Government and the dissent say this will not be the case. But lawyers who litigate cases, and judges, who regularly hear them, understand how litigation operates and why the Government's imaginary world cannot be.

As any practicing lawyer, or judge, would attest based upon life experience, the potential issues in cases do not appear in sharp focus, or in many instances at all, when the client first seeks legal assistance; indeed, issues sometimes surface for the first time long after a case begins, even when the case comes before this Court. Indigent clients retain Legal Services lawyers to bring welfare cases seeking money or other welfare benefits because they are sick, hungry, homeless, jobless, or in need of childcare--not because they wish to raise some

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U.S. 41, 55 n.22 (1999) (stating that facial challenge does not require proof that no set of circumstances exists under which statute would be valid); *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (Stevens, J., in support of denial of *certiorari*) (same).

[9] As Part II of the brief of *amici curiae* New York State Bar Association *et al.* demonstrates, it is pure fantasy to imagine that lawyers will materialize to take up the cause of welfare claimants seeking benefits (under statutes recognized by the Government itself to be complex) if Legal Services lawyers cannot represent them. For millions of poor Americans, the "choice" of a welfare representative is brutally simple: a Legal Services lawyer, or no lawyer at all.

landmark legal issue. Again, the blithe assumption of the dissent below and the Government's briefs that all constitutional and statutory issues will be spotted at the outset is inconsistent with experience--and "the life of the law . . . has been experience".[10]

Even if the possibility of a prohibited issue *is* spotted at the outset, the Legal Services lawyer and the client will often be pressed to forego the prohibited contention and proceed without it, to the detriment of both court and client. This is so because, as shown in the accompanying *amicus* brief of New York State Bar Association *et al.*, other counsel will often not be available, and lawyer and client will realize the client will be better served with a skilled lawyer than by the client *pro se* --albeit at the cost of a valuable issue.[11] Thus, in a situation where the lawyer sees a contention that the Government says *can* be raised, and a constitutional or statutory contention that the Government says is barred, the lawyer would be under pressure to press the first contention and abandon the second. That would permit the Government to dictate its opponent's litigation strategy and destroy the "genuine" adversity that justiciability requires. *Cf. United States v. Johnson*, 319 U.S. 302, 304-05 (1943) (for one party to "dominate" a dispute destroys the "'honest and actual antagonistic assertion of rights'" "essential to the integrity of the judicial process") (citations omitted).

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[10] Oliver Wendell Holmes, Jr., The Common Law 5 (Mark DeWolfe Howe ed. 1963).

[11] Moreover, unless the Government's construction is rejected, those at risk of being sanctioned and losing the funding that keeps their organizations in existence will "'steer far wider of the unlawful zone'" and thereby further silence valuable speech about legitimate constitutional and statutory issues. *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

The supposed Congressional ukase, subjecting the courts to a hamstrung lawyer on the plaintiff's side, forces courts into positions irreconcilable with their constitutionally recognized role and corrodes their Article III powers. A court may itself neglect or miss the possible constitutional and statutory issues because they are not raised. Or a court may assume (at the peril of constitutional government) that since a Legal Services lawyer has appeared, any statutory or constitutional issues have been conceded.[12]

Another possibility is that the court, knowing the Legal Services lawyer before it is hamstrung, will raise the prohibited statutory or constitutional issues with the parties *sua sponte* (with only one side able to comment), or consider the issues on its own. But courts cannot be forced by Congress to address important, complicated, and often previously unexamined issues without the benefit of full briefing--or with one-sided briefing. *See Bounds v. Smith*, 430 U.S. 817, 826 (1977) ("Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation".); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974) ("[A] court must rely on the parties' treatment of the facts and claims before it to develop its rules of law".). Rulings produced from this skewed process are more likely to be wrong; and such a process is utterly inconsistent with the jurisprudential safeguards stemming from the case or controversy requirement.[13]

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[12] Of course this would be wrong because, as shown above, the issue might not have been recognized yet or it might have been sacrificed by a calculus that, if forced to choose, it is preferable to press the non-prohibited issue and abandon the issue the Government has taken off the table.

[13] From its earliest days, this Court has required adversaries on both sides in Article III courts. The Constitution itself requires that there be a "case" or "controversy" before the "judicial power" can be invoked. One of this Court's first acts was the unanimous denial of a request for an advisory opinion. *See* 1 Charles Warren, *The Supreme Court in United*

Still another unrealistic assumption is that it is only the Legal Services lawyer who will initially conceive of a constitutional or statutory issue, either when first discussing the matter with the client or in the midst of the litigation.

The government defendant may place statutory questions squarely at issue in defense to whatever the welfare client is arguing. Under the Government's interpretation, the Legal Services lawyer would then have to delay the progress being made toward vindication of the client's rights, interrupt the case, and cast about for another lawyer who would be free to counter the government's argument. Or, if unsuccessful in this, just turn to the court and say: "You figure it out".

Similarly, the court may raise statutory or constitutional questions as it considers other points the parties have raised. What is a Legal Services lawyer to do if, during an argument, a judge at trial, or on appeal, asks whether the government's position violates the Constitution or is inconsistent with a statute, including the governing welfare statute? Should the lawyer say: "I decline to answer on the ground it may cost my employer its LSC funding"? Or: "Please interrupt the

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States History 486-89 (H. Johnston rev. ed. 1926).

The term "case" "implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication". *Muskrat v. United States*, 219 U.S. 346, 357 (1911). *See also Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) (stating case is justiciable where there is "a dispute between parties who face each other in an adversary proceeding").

It is understood that both the effective operations of courts and fairness to litigants (particularly litigants whose special needs are recognized by the Legal Services Corporation Act) require lawyers fully armed with all potential arguments. Lawyers sharpen the "presentation of issues upon which the court so largely depends for illumination of difficult . . . questions". *O'Shea*, 414 U.S. at 494 (internal quotation omitted). For "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries". *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964).

proceedings--and thereby delay vindication of my client's rights on the matters already being litigated--so that somebody can try--often fruitlessly--to come up with another lawyer who will appear to answer your question"?

If the Government's interpretation stands, courts will be confronted with a fully armed Government lawyer on one side of welfare cases, and a Legal Services lawyer with one arm tied behind his or her back on the other. There is decided impropriety in Congress subjecting courts to a contest between half a lawyer and a fully equipped lawyer--indeed a lawyer representing powerful governments whose own rules and regulations are before the court. There may be times when playing by Marquis of Queensberry rules is unnecessary, but litigation in which constitutional issues are at stake is not one of them.

2. Interpreting the Appropriations Rider to Preclude or Inhibit Argument of Constitutional and Statutory Issues Prevents Courts from Performing Their Article III Function.

A fundamental tenet of our constitutional system is that Congress cannot prevent courts outright from deciding constitutional issues in cases within their jurisdiction. *See, e.g., Marbury*, 5 U.S. (1 Cranch) at 176-78; James S. Liebman & William R. Ryan, *"'Some Effectual Power': the Quantity and Quality of Decisionmaking Required of Article III Courts"*, 98 Colum. L. Rev. 696, 829 (1998). Within the tripartite division of constitutional powers,

> "[i]t is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it must be exercised in a manner inconsistent with constitutional requirements *or, what in some instances may be the same*

> *thing, without regard to them*". *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting) (emphasis added).[14]

Logic dictates the same reasoning must bar the legislature from polluting the judicial process by subjecting courts to half-arguments that ignore the supreme law.

The Government's construction of the Appropriations Rider forces courts to decide cases where the lawyer for an indigent plaintiff has one arm tied behind his or her back. Because lawyers are the primary vehicle for adversary development of issues before the court, the Government's interpretation eviscerates judicial consideration of constitutional issues in cases brought by Legal Services lawyers. For Congress to hamper the judiciary's functioning in precisely the cases and controversies that are its "province" and "duty" to decide violates the Separation of Powers. Congress cannot constitutionally ask the courts to pass over--or even attempt to guarantee that they overlook--legislative enactments that are contrary to law. *See Marbury*, 5 U.S. (1 Cranch) at 177-78; *Dickerson v. United States*, No. 99-5525, 2000 WL 807223, at *6, (S.Ct., June 26, 2000) (citing *City of Boerne v. Flores*, 521 U.S. 507, 517-521 (1997)). Assuming Congress can bar Legal Services lawyers from bringing certain kinds of cases, what it cannot do is put Legal Services lawyers into cases and then (if the Government's interpretation is accepted) bar them from making claims--or even arguments--based upon the Constitution or statutory law.

Separation of Powers requires one branch not undermine or impair the performance of another. *See CFTC v. Schor*, 478 U.S. 833, 851 (1986); *Loving v. United States*, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to

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[14] Though Justice Rutledge wrote in dissent, "[this] Court, the canonical literature, and Congress have treated Rutledge's statement as authoritative". Liebman, 98 Colum. L. Rev. at 829. *See, e.g., Sioux Nation*, 448 U.S. at 392; Hart, 66 Harv. L. Rev. at 1373; *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995).

itself, moreover, the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties") (citations omitted). Given that *Loving* announced the non-impairment principle in the context of a conflict between the executive and legislative branches, it follows *a fortiori* that the rule applies with even greater force in an interbranch collision involving the judicial branch, which is "beyond comparison the weakest" department, *Federalist No. 78* at 465-66, and thus requires, if possible, still more vigilance against encroachments by its coordinate branches.

When Congress skews the adversary process in its own favor, or sets up court proceedings where a fully equipped government lawyer is to do battle with a hamstrung lawyer, the legitimacy of the courts--of the "judicial power" itself--is at stake. Courts must "take care to speak and act in ways that allow people to accept" their decisions. *Casey*, 505 U.S. at 865 (1992). They must guard against perceptions they have presided over unjust proceedings, a perception that "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process". *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). "[T]he rule of law implies equality and justice in its application". *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972). If courts are forced to decide cases where Congress has altered the balance between contending parties and placed a thumb on the scales of justice in favor of government--including the Federal government itself--a perception of injustice is inevitable.

* * * *

All the erroneous assumptions about the conduct of litigation inherent in the Government's interpretation, as well as all the harm to the courts and perversions of the adversary system it entails, would be avoided if we are correct that the Government's interpretation of the Appropriations Rider is wrong. (*See* Point III.)

But if the Government is right that the Rider broadly bars all contentions regarding welfare rules, regulations, or statutory provisions, and, indeed that Legal Services lawyers cannot even make constitutional or statutory *arguments* in support of a client's request for the "specific relief" of money or other welfare benefits, then the Appropriations Rider is an unconstitutional incursion on the Separate Powers of the Judicial Branch.

II. APPLICATION OF THE GOVERNMENT'S CONSTRUCTION TO CASES IN THE STATE COURTS WOULD ALSO VIOLATE PRINCIPLES OF FEDERALISM.

State courts, like federal courts, are bound to uphold the Constitution of the United States and laws made in pursuance thereof. U.S. Const. Art. VI ("This Constitution . . . shall be the Supreme law of the land . . . and the Judges in every state shall be bound thereby"). *See Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring); *Steffel v. Thompson*, 415 U.S. 452, 482, n.3 (1974) (Rehnquist, J., concurring); Liebman, 98 Colum. L. Rev. at 701. State courts obviously also are vital to defining and upholding state constitutions, laws, and regulations.

Under the Government's interpretation of the Rider, even if a sovereign state believes the contours of its welfare system are best defined through full and free litigation in its state courts--even if the state legislature so decrees and state Governor so announces--Legal Services lawyers in those state courts still cannot make the arguments deemed appropriate by the entire mechanism of state government. Given the "inviolable sovereignty" of the states,[15] this Court should not presume Congress intended to work such an interference with state courts unless that intention is "unmistakably clear". *See*

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[15] *E.g., Alden v. Maine*, 119 S.Ct. 2240, 2247 (1999) (quoting *The Federalist* No. 39, at 245 (James Madison)).

Gregory v. Ashcroft, 501 U.S. 452, 460-62 (1991). Obviously, the Rider fails for lack of such clarity.

III. THE APPROPRIATIONS RIDER SHOULD NOT BE INTERPRETED TO BAR LEGAL SERVICES LAWYERS FROM CLAIMING--OR EVEN ARGUING--THAT A PARTICULAR WELFARE RULE, REGULATION, OR PROVISION IN A WELFARE STATUTE IS UNCONSTITUTIONAL OR CONTRARY TO STATUTORY LAW.

The Government's interpretation is wrong. It is inconsistent with the language of the Appropriations Rider itself. It would cause ludicrous and anomalous results in the courts.

Careful examination of the Rider as a whole reveals that--at most--it can be read to prohibit seeking certain broad-ranging structural, or policy-based remedies--*not* contentions that an individual welfare rule, regulation or provision in a statute is either unconstitutional or contrary to statutory law, including the governing welfare act itself. Moreover, the proviso on which the Government relies limits only the *type of relief* that may be sought. If the "specific relief" is for money or other welfare benefits, there is no bar on making constitutional or statutory arguments in support of that relief. Thus, the proper reading of the Rider is one that allows all claims that are not "effort[s] to reform" a welfare "system", and indeed authorizes all necessary and proper arguments on behalf of individual clients in suits for specific relief.

The error of the Government's interpretation is made even clearer by two bedrock legal principles of this Court's constitutional jurisprudence: *first,* statutes should, if possible, be construed to avoid constitutional questions, as well as conflicts with other statutes; *second*, Congress should not be assumed to have legislated to hamper courts' ability to decide cases within their jurisdiction, unless Congress' intent to do so is "clear". No such clear intent is manifested here.

A. The Government's Interpretation Is Wrong.

Public Law 104-134, passed by the 104th Congress in April 1996 as an "Appropriations Act", was said to be an Act "making appropriations for the Departments of Commerce, Justice and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1996, and for other purposes". Pub. L. No. 104-134, 110 Stat. 1321 (1996). The Legal Services Corporation (the "LSC") is among the myriad (89) departments, agencies, commissions, administrations, offices, divisions, councils, institutes, programs, funds and services for whom funds were appropriated by the Act.

Section 504 of the Appropriations Act placed substantive limitations on the kinds of legal activities that can be undertaken by persons or entities that receive LSC funds.

Subsection (a)(16) of Section 504 forbids any LSC funds to be provided to an entity or person that:

> "initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation".

In what follows, we refer to the language through "effort to reform a Federal or State welfare system" as the basic prohibition. The remainder is referred to as the proviso and its exception.

The Rider's basic prohibition is against an "*effort to reform a Federal or State welfare system*" by means of "litigation, lobbying, or rulemaking". Whatever these words mean, they certainly do not prevent a Legal Services lawyer

from contending that an individual rule, regulation or provision of a welfare statute is either:

(1) inconsistent with the governing welfare statute or another statute, or

(2) inconsistent with the Constitution.

Such arguments with regard to individual rules, regulations, or statutory provisions are (1) not directed toward "a welfare system", and (2) are not "effort[s] to reform". To the contrary, they are *efforts to assure compliance with the law.* Whatever is barred must be an "effort to reform" a Federal or State welfare "*system*". As the LSC's brief recognizes, this means "broad-ranging litigation". Br. of LSC at 2.[16] Thus, the basic prohibition does not forbid a claim on behalf of an individual client that a particular rule, regulation, or statutory provision is illegal or unconstitutional. Indeed, it could never be "reform" to require that a law conform to the Constitution; that is simply the basic prerequisite for all laws under the Supremacy Clause and *Marbury.*

Because the Rider is so limited to broad "effort[s] to reform" a welfare "system", the Government's interpretation is not saved by the proviso and exception to the proviso that follow the basic prohibition.

As a matter both of logic and conventions in the interpretation of statutes and other writings, the proviso/exception cannot pump substance into the basic provision that is not in the basic provision in the first place. *See* 2A *Sutherland Stat. Const.* § 47.08 (5th ed. 1991) (stating that the purpose of provisos is to restrict the effect of the existing statutory language to *less* than what its scope of operation *would be otherwise*); 73 Am. Jur. 2d *Statutes* § 318

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[16] That the word "litigation" in the basic provision is linked with "lobbying" and "rulemaking" further supports the conclusion that the basic prohibition is directed at policy-oriented changes that attempt to "reform" the welfare "system".

(1974) ("The natural and appropriate office of a proviso is to create a condition precedent; to except something from the enacting clause; to limit, restrict, or qualify the statute in whole or in part; or to exclude from the scope of the statute that which otherwise would be within its terms"); *Commonwealth of Pennsylvania v. Brown*, 260 F. Supp. 323, 350 (E.D. Pa. 1966) (provisos are "qualifiers, not nullifiers"); *State ex rel. Browne v. Hechler*, 476 N.E. 2d 559, 561 (W.Va. 1996) (same as *Sutherland*); *Sanzone v. Board of Police*, 592 A.2d 912, 918 (Conn. 1991) (provisos "restrict" scope of a statute); *Commerce Bank of Kansas City, N.A. v. Missouri Div. of Finance*, 762 S.W.2d 431, 436-37 (Mo. App. 1988) (same as *Sutherland*).

The basic prohibition forbids only "effort[s] to reform" a welfare "system"; the rules of construction above demonstrate that no proviso or exception can *add* conduct--such as making non-systemic arguments--that would not "otherwise be within its terms". These points alone should trump the Government's interpretation.[17]

In any event, though (as shown above) the Rider read as a whole cannot mean what the Government says it does, it is also true that the words of the proviso/exception *looked at alone* do not support the Government's interpretation. The language of the proviso/exception, looked at alone, shows that, whatever

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[17] The United States refers to the proviso and its exception as a "rule of construction". Br. of United States at 26. We agree to the extent that the proviso and exception should be read as inseparable from--and having no power to alter what is contained within--the basic prohibition against "effort[s] to reform" a welfare "system". Where we differ from the Government is that we do not agree that a lawyer's claim that a welfare rule, regulation or provision in a statute is unconstitutional or illegal is an "effort to reform" a welfare "system". We also differ on the meaning of the proviso/exception (when looked at alone). The Government says constitutional and statutory arguments never can be made; we say that such arguments can be made where the "specific relief" sought is for money or other welfare benefits.

might be barred, it is not making *particular arguments*; rather, what it may bar is seeking certain broad-ranging types of *relief*. Thus, a Legal Services lawyer whose requested *relief* is for money or other welfare benefits for the welfare client, is just as free as any other lawyer to *argue* that the client is entitled to that relief based upon some statutory or constitutional point.

The proviso/exception is, at most, barring the seeking of relief, other than specific welfare benefits such as cash benefits, job training or child care vouchers, for a client--for example, contending that a state's "welfare system" is so flawed that a court should supervise a welfare department, or seeking system-wide injunctive relief even without class certification, or arguing that a state constitution's social welfare provisions supersede welfare legislation entirely.[18]

The words "*amend* or otherwise challenge" in the proviso/exception support the conclusion--drawn from the words of the basic prohibition--that the Appropriations Rider is not designed to prevent a claim on behalf of an individual eligible client seeking to enforce governing law by showing a particular welfare rule, regulation or provision in a statute would be unconstitutional or illegal if it was construed to deny benefits. Consistent with the basic prohibition against wide-ranging, systemic reform, the proviso clarifies that what remains prohibited--even under the exception for specific relief--are challenges so broad-based to be tantamount to "amend[ing]" existing law.

Another point based upon the words of the proviso/exception arises from analyzing the Government's interpretation as applied separately to (i) statutory arguments, and (ii) constitutional arguments.

As to statutory arguments, whatever the words "amend or otherwise challenge" mean, they clearly should not prohibit a

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[18] Of course, this understanding accords with the meaning of the basic prohibition against "effort[s] to reform" a welfare "system".

contention that a challenged rule, regulation or statutory provision is inconsistent with the governing welfare statute or with another statute. Indeed, such arguments would be "an effort" to enforce (not to "amend or otherwise challenge") "existing law".

If one accepts (based on the clear language of the Rider) that arguments brought under the existing statutory law are permissible, can the Government still contend that a Legal Services lawyer is barred from claiming that the rule, regulation or provision in a statute relied upon by the welfare agency is inconsistent with the Constitution? This position would be wrong for all the reasons set forth above and much more.

First, as we show in Part B below, Congress' intent to achieve such a strange prohibition, singling out constitutional arguments as beyond the pale, must be "clear"; it certainly is not.

Second, the Government's interpretation would produce ludicrous and anomalous results in litigation. When faced with a potentially unconstitutional rule or regulation, a traditional argument to a court is that an adversary's position should be rejected so as to avoid a constitutional problem. Does the Rider permit such constitutional avoidance arguments? The Government has never said it does--and Legal Services lawyers cannot risk the funding of their organizations by gainsaying the Government's desire to limit criticism.[19] Such an interpretation by the Government would be just an extreme example of its error: arguments that by their very nature are intended to *assure* compliance with the Constitution itself are banned as "effort[s] to reform".

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[19] If, however, the Government announces that constitutional avoidance arguments are permitted, even though a contention that a challenged provision is in fact unconstitutional is barred, it would further illustrate the illogical and inappropriate contortions caused by the Government's interpretation of the Rider.

As shown above, the Government's construction is contrary to the language of the Rider.[20] The Government's erroneous construction is not saved by the LSC's final rule (*supra* note 2) for three reasons.

First, Congress did not expressly instruct the LSC to promulgate regulations pursuant to Section 504(a), and the regulations therefore are entitled to less deference under *Chevron v. NRDC, Inc.*, 467 U.S. 837, 843 (1984), than regulations promulgated pursuant to such express instructions as appear elsewhere in the Rider. *E.g.*, Sec. 503(3)(b) (directing the agency to promulgate regulations to implement a competitive selection process).

Second, the agency's interpretation is not "reasonable", as required under *Chevron*, because its reading would be an "affront to common English usage." *Id.* at 860. The words "effort to reform a . . . system" do not connote in any way a claim that a particular provision is unconstitutional or illegal. Moreover, if Congress intended to depart so far from ordinary usage and use "litigation . . . involving an effort" to denote only *government* efforts, Congress could have so specified. *Cf. Pittston Coal Group. v. Sebben*, 488 U.S. 105, 112-115 (1988) (refusing to narrow term "criteria" in a statute to mean only specific criteria).

But that is not what Congress did. Instead, the Rider precludes lawyers from commencing litigation involving "an effort" to reform a welfare system, which clearly refers to efforts by the lawyer him-or-herself. Moreover, the

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[20] In evaluating the speech implications of the Government's construction, however, the decision below apparently accepted the Government's interpretation of the Rider. *E.g., Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 769 (2d Cir. 1999). The proper construction of the Rider thus is squarely before the Court. (Indeed, it would be even if the decision below had not reached this question, under, *e.g.*, *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("[T]he prevailing party may defend a judgment on any ground")).

Government's interpretation would not be harmonious with the language of the proviso, which permits constitutional and statutory arguments in suits for specific relief such as money or welfare benefits.

Third--and most fundamentally--independent of the problems that the agency's interpretation creates under *Chevron* itself, *Chevron* cannot save an otherwise unconstitutional statutory construction. Even if two interpretations were equally possible under *Chevron*, which is not the case, *Ashwander*'s principle of constitutional avoidance nevertheless would direct this Court to choose the one free of constitutional defects. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (subjecting agency regulations to constitutional avoidance analysis); *American Trucking Assocs., Inc. v. EPA*, 195 F.3d 4, 14 (D.C. Cir. 1999) (Silberman, J., dissenting) ("In other words, [after *Rust*], the constitutional avoidance canon trumps *Chevron* deference".).

B. Under the Principles Set Forth by This Court in *Ashwander* and Related Cases, the Interpretation Given to the Appropriations Rider by the Government Should Be Rejected.

As we have shown above, the Government's interpretation of the Appropriations Rider is wrong; it conflicts with the language of the Rider itself. Nonetheless, should the Court determine a question of statutory construction exists, under *Ashwander* the statute should be construed, if possible, to avoid the numerous constitutional problems identified by this brief and the briefs of Respondents and other *amici*. For, "when the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided". 297 U.S. at 348 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 n.8 (1932)). *See also Gomez v. United States*, 490 U.S. 858, 864 (1989); *United States v.*

National Treasury Employees Union, 513 U.S. 454, 478 (1995).

It undoubtedly is "possible" (indeed, correct, as we have shown above) for the Court to construe the statute so as to avoid the "serious constitutional issues" presented by the Rider's violation of the Separation of Powers, the First Amendment, and principles of federalism. For that reason alone, this Court should reject the Government's interpretation and read the statute to avoid the serious constitutional problems that stem from the Government's construction.[21]

If *Ashwander* were not sufficient to doom the Government's interpretation (though it clearly is), the Government's construction would still be constitutionally suspect based on the Rider's lack of clarity in (as the Government would have it) singling out constitutional claims for suppression. Just as, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear", *Webster,* 486 U.S. at 603; *see also Weinberger*, 422 U.S. at 765, Congress should not lightly be assumed to have removed constitutional claims from judicial scrutiny by silencing--for all practical purposes--the lawyers who can bring them. The principle that a "serious constitutional question" arises in the absence of a judicial forum for "colorable" constitutional claims indicates that clear intent is required--as it should be--before Congress will be taken to have intruded upon the "province and duty" of the "weakest department". *Cf. Webster*, 486 U.S. at 603-04 (limiting the elimination of

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[21] In addition, the Court should reject the Government's construction of the Rider because it would cause conflicts with the ethical provisions of the LSC Act, as set out in the accompanying *amicus* brief of New York State Bar Association *et al.* and Brief of Respondents at 48-50. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (court should avoid conflict between statutes); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (same). This principle "applies with even greater force when the claimed repeal rests [as here] solely on an Appropriations Act". *TVA v. Hill*, 437 U.S. 153, 190 (1978).

review only to those claims specifically listed in the statute and narrowly tailored to its text); *Weinberger*, 422 U.S. at 762 (looking at "plain language" of statute for prohibition of claims).

CONCLUSION

For the reasons stated, the Court should hold either (1) that the Appropriations Rider is unconstitutional on Separation of Powers and federalism grounds, as well as under the First Amendment; or (2) that the Rider does not prohibit Legal Services lawyers from making claims, or arguments, that a particular welfare rule, regulation or statutory provision violates the Constitution or statutory law.

Respectfully submitted,

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** As required by Sup. Ct. R. 37(6), we state that this brief was not authored by counsel for any party.